

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEANETTE K. JORDAN-CAIN
Claimant

VS.

STATE OF KANSAS
Respondent

AND

STATE SELF-INSURANCE FUND
Insurance Fund

Docket No. 1,058,565

ORDER

STATEMENT OF THE CASE

The parties appealed the November 27, 2013, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. John M. Ostrowski of Topeka, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance fund (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 25, 2013, preliminary hearing and exhibits thereto; the transcript of the March 27, 2012, deposition of Robert W. Barnett, Ph.D., and exhibits thereto; the transcript of the February 28, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

In the Preliminary Hearing Order dated April 6, 2012, the ALJ granted claimant's request for medical treatment for her psychological condition. Relying on the expert testimony of Dr. Barnett, the ALJ found claimant's July 19, 2011, work injury was the prevailing factor for claimant's current psychological condition. However, the ALJ determined claimant was not entitled to temporary total disability payments because claimant chose to voluntarily retire and respondent was accommodating claimant's restrictions. In a July 12, 2012, Order, the Board found it had no jurisdiction to consider the issue of whether the ALJ erred in denying temporary total disability benefits. However,

the Board reversed the ALJ's finding that claimant's psychological condition arose out of and in the course of her employment, stating:

Claimant had many psychological issues that preceded her left wrist injury and was prescribed two anti-depression medications. Claimant again sought treatment for depression when her mother died. It is difficult to understand how Dr. Barnett arrived at the opinion that claimant's left wrist injury was the prevailing factor causing her dysthymic disorder and need for current psychological treatment. This Board Member concludes that claimant failed to prove by a preponderance of the evidence that her left wrist injury was the prevailing factor in causing her psychological condition and her current need for psychological treatment.¹

Another preliminary hearing was held on November 25, 2013. In her November 27, 2013, Preliminary Hearing Order, ALJ Sanders required respondent to provide claimant psychological treatment with Dr. M. A. Abbott. ALJ Sanders indicated two psychological experts opined claimant's work injury was the prevailing factor for her major depression, while two physicians, who have no psychological expertise, gave differing opinions. The ALJ found claimant's post-injury diagnosis of major depression was a diagnosis different than her prior psychological condition.

Claimant requests the findings that claimant's psychological condition arose out of and in the course of her employment with respondent and treatment with Dr. Abbott be affirmed. However, claimant asserts the ALJ erred by not ordering temporary total disability benefits.

Respondent alleges claimant's need for psychological treatment did not arise out of and in the course of her employment. Specifically, respondent asserts claimant's left wrist injury was not the prevailing factor causing her psychological condition and current need for psychological treatment. Respondent asserts the Board does not have jurisdiction to review the ALJ's finding that claimant is not entitled to temporary total disability benefits.

The issues are:

1. Did claimant's psychological condition arise out of and in the course of her employment? Specifically:

A. Is claimant's psychological condition directly traceable to her work-related physical injury?

B. Is claimant's work accident the prevailing factor for her psychological condition?

¹ *Jordan-Cain v. State of Kansas*, No. 1,058,565, 2012 WL 3279504 (Kan. WCAB July 12, 2012).

2. Does the Board have jurisdiction to review the ALJ's decision denying claimant temporary total disability benefits?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

This Board Member incorporates by reference the findings of fact contained in the Board's July 12, 2012, Order.

At the November 25, 2013, preliminary hearing, claimant testified that since last testifying in February 2012, her emotional condition is much worse. She testified her left hand cannot be fixed and that makes her feel hopeless. She is unable to socialize and sometimes does not get dressed for days. Claimant stays in her house and does not eat right, as it is hard to prepare meals with one hand. She does not sleep well and is depressed. After the Board's previous order, claimant received psychotherapy at her own expense, but quit after a month because she could not afford the substantial co-pay. Later, claimant testified she saw Dr. Abbott approximately through April 2013. Although her condition has worsened since February 2012, claimant felt her treatment with Dr. Abbott was helpful. Claimant acknowledged she has taken Xanax since approximately 2005.

Andrew H. Schauer, Ph.D., employed by claimant's attorney, was asked, among other things, to provide an opinion about claimant's current diagnosis and how, if at all, it is traceable to her work injury and its sequelae. Dr. Schauer did not testify, but his psychological evaluation report was made part of the record. Dr. Schauer's report indicated he used the following psychological procedures as sources of information when evaluating claimant: (1) clinical interview; (2) personal history form; (3) Minnesota Multiphasic Personality Inventory 2 RF; (4) social support questionnaire; and (5) Gorham's Proverbs.² The doctor also reviewed the report of Dr. Barnett; Dr. Barnett's deposition transcript; claimant's psychological treatment records from New Beginnings from September 1, 2003, through January 10, 2012; medical records concerning claimant's work injury; the April 6, 2012, Preliminary Hearing Order; and the Board's July 12, 2012, Order.

Dr. Schauer posed five hypotheses concerning the issue of whether claimant's psychological condition is traceable to her work injury. Dr. Schauer then went through findings favoring and not supporting each hypothesis.

The first hypothesis of Dr. Schauer was: "The ongoing pain associated with her work-related injury and subsequent limitations caused Major Depression, Recurrent,

² Dr. Schauer's report did not explain Gorham's Proverbs.

Severe without Psychotic Features.”³ One finding in favor of this hypothesis was that treatment records in December 2011 showed a change in therapy issues from grief over the death of her mother to depression from her injury-related premature retirement. Dr. Schauer also indicated claimant had five or more symptoms of depression during a two-week period that represented a change from her previous state. Claimant reported to Dr. Schauer of being depressed, not sleeping well, failing to bathe for up to four days during the past couple of months, only leaving her house to get the newspaper, little to no pleasure/interest in life around her, diminished concentration and feelings of worthlessness/guilt/hopelessness. Findings not supporting the hypothesis included claimant’s pre-existing history of depression, grief issues over her mother’s death and difficulty in sorting the degree of preexisting depression from post-injury depression.

Dr. Schauer’s second hypothesis was: “The Claimant’s [sic] has Major Depression, Recurrent, Severe without Psychotic Features prior to 7/19/11 and was aggravated by but not proximately caused by the work-related injury.”⁴ One finding by Dr. Schauer in favor of this hypothesis was the life changes since claimant’s work injury exceeded the factors involved in her previous depressive episodes contributing to her recent depression including chronic pain, loss of employment, loss of social support, loss of purposeful activity and loss of financial opportunity with continued employment with respondent. One finding against this hypothesis was that the Board found against claimant.

The third hypothesis of Dr. Schauer was: “The Claimant has a longstanding personality disorder antecedent to and unrelated to her injury better explains her psychological complaints.”⁵ In support of this hypothesis, Dr. Schauer noted there was the possibility of a longstanding personality disorder existing in light of the behavioral evidence of years of interpersonal conflict and failure. A finding against this hypothesis was nothing in claimant’s psychological records since the mid-1990s pointed to a clinician’s discussion or diagnosis of a personality disorder.

Dr. Schauer’s fourth hypothesis was: “Although the Claimant demonstrates some depressed mood and impairment in daily functioning, those features arise from alcohol/drug use/abuse rather than from the alleged injury or subsequent reports of pain.”⁶ Dr. Schauer indicated there was nothing in claimant’s psychological records or her current psychological examination that pointed to addiction issues.

³ P.H. Trans. (Nov. 25, 2013), Cl. Ex. 1 at 3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

The fifth hypothesis of Dr. Schauer was: “Although the Claimant experienced a work injury, she may have overstated psychological consequences.”⁷ In support of this hypothesis, Dr. Schauer noted claimant’s psychological testing pointed to possible overstating of somatic responses when compared with claimant testing norms. One of the findings against this hypothesis was that elevation on test norms often occurred with individuals experiencing chronic emotional or medical states as a “cry for help.” Dr. Schauer also indicated that claimant’s previous psychological evaluation found her psychological symptoms authentic. He also found the way claimant described her physical and emotional concerns through her current testing measures was consistent with his interview observations.

Dr. Schauer then stated in his report: “In my opinion, the greater weight of the psychological evidence supports the hypothesis 1: The ongoing pain associated with her work-related injury and subsequent limitations caused Major Depression, Recurrent, Severe without Psychotic Features.”⁸

Dr. Chris D. Fevurly conducted a second medical evaluation of claimant on November 16, 2013. The doctor did not give an opinion concerning claimant’s psychological condition.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁹ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”¹⁰

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

⁷ *Id.*

⁸ *Id.*, Cl. Ex. 1 at 5.

⁹ K.S.A. 2011 Supp. 44-501b(c).

¹⁰ K.S.A. 2011 Supp. 44-508(h).

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

In *Adamson*¹¹ and *Love*¹² the Kansas Court of Appeals stated that in order to establish a compensable claim for traumatic neurosis, claimant must show: (1) a work-related physical injury; (2) symptoms of the traumatic neurosis; and (3) that the neurosis is directly traceable to the physical injury.

Respondent, in its brief to the Board, indicated the only new evidence presented since the Board's previous Order concerning claimant's psychological condition was claimant's preliminary hearing testimony and Dr. Schauer's psychological evaluation report. The question then becomes: was the evidence presented prior to the ALJ's November 27, 2013, Preliminary Hearing Order sufficient to prove claimant's psychological condition arose out of and in the course of her employment with respondent?

There is ample evidence in the record to establish that prior to her work injury, claimant suffered depression for a number of years. She first saw a psychotherapist in the 1980s. Claimant acknowledged taking antidepressants since the mid-1990s and having anxiety and depression. In 2005, claimant had feelings of sadness and depression after her fourth divorce and her physician prescribed Xanax, an anti-anxiety medication, so claimant could sleep. In 2004, claimant, after her divorce, received psychotherapy from Dr. Abbott.

Claimant's most recent round of psychological issues began with the death of her mother in June 2011. After a two-year hiatus, claimant again saw Dr. Abbott in September 2011 because of difficulty dealing with her mother's death and family relationships. Dr. Abbott's notes indicated she saw claimant on December 6, 2011, nearly five months after the left wrist injury, for depression and grief. It appears the first mention of claimant's left wrist injury in Dr. Abbott's notes was also on December 6, 2011.

The underlying issues are whether claimant's psychological condition is traceable to her physical injury and was claimant's left wrist injury the prevailing factor causing claimant's psychological condition and current need for psychological treatment?

Respondent argues no medical evidence was presented showing a causal connection between claimant's left wrist injury and her psychological condition. Nor was there medical evidence claimant's left wrist injury was the prevailing factor causing claimant's psychological condition and current need for psychological treatment.

¹¹ *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

¹² *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

Respondent bases this argument on the fact that Drs. Barnett and Schauer are psychologists and not medical doctors.

The Board disagrees with the aforementioned argument of respondent. This Board Member acknowledges that under K.S.A. 2011 Supp. 44-510e(a)(2)(B), competent medical evidence is necessary to establish the percentage of a claimant's functional impairment. However, the appellate courts have held the finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.¹³ Neither the Kansas Workers Compensation Act, nor case law, imposes a requirement that a worker must prove by competent medical evidence he or she sustained a personal injury by accident arising out of and in the course of his or her employment.

Respondent argues the additional evidence presented by claimant at the November 25, 2013, preliminary hearing does not tip the scales in claimant's favor. Respondent asserts Dr. Schauer's report contains the same fundamental flaws as Dr. Barnett's opinion. Respondent argues Drs. Barnett and Schauer attribute claimant's psychological condition to a variety of factors, including loss of employment, loss of social support, loss of purposeful activity and loss of financial opportunity due to no longer being employed. According to respondent, the loss of employment and resulting loss of financial opportunity were caused not by claimant's work injury, but because claimant voluntarily quit her job and retired.

This Board Member finds that at this juncture of the proceedings, claimant tipped the scales and proved by a preponderance of the evidence her psychological condition arose out of and in the course of her employment with respondent. The evidence shows claimant's psychological condition is traceable to her physical injury and her left wrist injury is the prevailing factor causing claimant's psychological condition and current need for psychological treatment.

Two psychologists, Drs. Barnett and Schauer, concluded claimant's work injury was the cause of her post-injury psychological condition. Both psychologists evaluated claimant to determine the nature and cause of her psychological condition. Drs. Barnett and Schauer interviewed claimant concerning her psychological condition and had claimant complete an MMPI. Their opinions that claimant's work injury caused her psychological condition are uncontroverted by another psychologist or psychiatrist.

Dr. Schauer indicated claimant has symptoms that were not present previously, including failing to bathe for up to four days during the couple of months prior to seeing Dr. Schauer, only leaving her house to get the newspaper, little to no pleasure/interest in life around her and diminished concentration. Claimant's preexisting depression was

¹³ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

caused by her divorce, family relationships and her mother's death. However, Dr. Schauer indicated that in December 2011, claimant's grief from her mother's death was replaced by depression from her injury-related premature retirement. The doctor indicated claimant had five or more symptoms of depression during a two-week period that represented a change from her previous state.

Drs. Zhengyu Hu and Fevurly indicated claimant's psychological condition is not a result of her work injury. However, neither of those physicians are trained psychologists. This Board Member finds it significant that neither Dr. Hu nor Dr. Fevurly conducted a psychological evaluation of claimant as did Drs. Barnett and Schauer. Moreover, Dr. Brett E. Wallace, another of claimant's treating medical doctors, noted on November 28, 2011, that claimant wanted him to indicate she might need some help with a therapist to talk about her anxiety or depression that may be associated with her injury.

The ALJ's Preliminary Hearing Order and claimant's brief to the Board referenced *Finton*,¹⁴ a prior Board decision from a preliminary hearing appeal. *Finton* involved a claimant who fainted and struck his head after seeing his own blood following a work-related cut. In *Finton*, another Board Member concluded Mr. Finton's head injury was due to fainting, which was the direct and natural result when he saw his blood caused by his work injury, not due to his propensity to faint at the sight of his own blood, which respondent argued was not compensable as a personal risk.

The ALJ indicated in the Preliminary Hearing Order that in *Finton*, once there is a qualifying injury under the natural and probable secondary injury rule the psychological or secondary injury does not have to meet the prevailing factor test to receive authorized medical treatment. The Board Member who decided *Finton* did not reach such a conclusion. Rather, the Board Member who decided *Finton* noted the new law did not abrogate the direct and natural result rule as established by case law. Such Board Member also analyzed whether certain new law defenses, such as K.S.A. 2012 Supp. 44-508(f)(3)(A)(iii & iv) might have barred compensability. There would be no need to analyze such new law defenses if the new law did not apply to secondary injuries.

While the Board Member deciding *Finton* concluded that claimant's head injury was the direct and natural result of his compensable thumb laceration, *Finton* does not stand for the proposition that new law requirements do not apply to secondary injuries. The Board Member who decided *Finton* clarified his position on this issue in *Griffie*.¹⁵

¹⁴ *Finton v. Peninsula Gaming Partners*, No. 1,064,118, 2013 WL 4779986 (Kan. WCAB Aug. 22, 2013).

¹⁵ *Griffie v. Watson Services*, No. 1,064,916, 2014 WL 889875 (Kan. WCAB Feb. 7, 2014).

The issue of whether the ALJ should have awarded claimant temporary total disability benefits is not jurisdictional at this juncture of the proceedings.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁷

WHEREFORE, the undersigned Board Member affirms the November 27, 2013, Preliminary Hearing Order entered by ALJ Sanders finding that claimant's psychological condition arose out of and in the course of her employment with respondent and ordering psychological treatment with Dr. Abbott. The Board dismisses for lack of jurisdiction claimant's appeal that the ALJ erred in not awarding temporary total disability benefits.

IT IS SO ORDERED.

Dated this ____ day of March, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Rebecca Sanders, Administrative Law Judge

¹⁶ K.S.A. 2012 Supp. 44-534a.

¹⁷ K.S.A. 2012 Supp. 44-555c(k).